STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals, Judges Zahra, P.J., White and Hoekstra, JJ.

ATTORNEY GENERAL and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs-Appellants,

-vs-

WOODLAND OIL CO., INC., a Michigan corporation, BAY OIL CO., INC., a Michigan corporation, jointly and severally,

Defendants-Appellees.

Docket No. ~~116752~~ 120139
Court of Appeals No. 213707
Lower Court No. 97 85844-CE

APPELLEE'S BRIEF OF BAY OIL CO., INC.

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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STATEMENT AS TO JURISDICTIONAL SUMMARY

Defendant-appellee Bay Oil Co., Inc., accepts appellant's Statement of Basis of Jurisdiction.

STATEMENT AS TO STANDARD OF REVIEW

Defendant-appellee accepts the proposed Standard of Review.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

I. Did the trial court correctly dismiss plaintiff's cost recovery count pursuant to the statute of limitations of MCL 324.20140(1)(a), where clean-up and removal constituting remedial action as defined in MCL 324.20101(1)(cc), had been approved by the MDEQ, and, construction activities initiated more than six years before plaintiff filed suit?

Trial court answers "yes".

Court of Appeals answers "yes"

Appellant answers "no".

Appellees answer "yes".

II. Should an interpretation of MCL 324.20140(1)(a), be adopted whereby the MDEQ may elect to have the statute of limitations never commence as to it by its unilateral waiver of formalities, so as to prolong endlessly its ability to commence a cost recovery action, even though a site of contamination has been cleaned up to the satisfaction of the MDEQ, and the MDEQ is inconsistently claiming that on the one hand remedial action never occurred, yet on the other hand, that the case is ripe for it to commence suit for recovery of its clean-up costs?

Trial court answer: Not answered.

Court of Appeals answer: Not answered.

Appellant answers "yes".

Appellees answer "no".

COUNTER STATEMENT OF FACTS

Appellee Bay Oil Co. does not accept plaintiff's Statement of Facts. In order to avoid a competing Statement of Facts, the factual matters that are most strongly disagreed with are set forth herein.

1. The characterization of the approval of the 1989 clean-up plan is incomplete. Mr. Robert Kettner, the MDEQ Environmental quality manager who approved the remedial action in 1989, testified that the 1989 plan that he approved on behalf of the MDEQ was in fact a plan for clean-up of the site. It planned for clean-up in three phases. And, the modality of clean-up selected as well as that ultimately utilized by the MDEQ was the same as that approved by him in the plan submitted in 1989, that being, removal of contaminated soil. The self-serving characterization by MDEQ of the clean-up as "interim response" distorts the reality that the actual clean-up was approved and initiated in 1989, more than six years before suit was filed. The testimony supporting this of Mr. Kettner is as follows:

> "A. Oh, I find a letter in the file to a Mr. Steve Burlingame, an attorney representing Woodland Oil, as far as I can remember, regarding **a work plan that was submitted to us**. I believe it was under the name of Gosling & Czubak on their letterhead that discussed excavation of contaminated soils and product removal and other groundwater investigation activities in two phases. **My letter of April 20, 1989, indicated they were to proceed with Phase I clean-up plan** with some three clarifications to items in that work plan.
>
> "Q. What is the date of your letter Mr. Kettner?
>
> "A. April 20, 1989.
>
> * * *

"Q. Okay. **So there isn't any question that Gosling & Czubak submitted a work plan to you for some remedial activities. And that was -- what -- the first phase of that?**

"**A. Yes.**

"**Q. Soil excavation?**

"**A. Yes.**

"Q. And then what were the other phases to consist of?

"A. **Phase II was an investigation of dissolved hydrocarbon in the groundwater. Phase III was groundwater treatment.**

"Q. Now as I understand it from Mr. Cunningham's deposition, some of the other phases weren't undertaken by Gosling & Czubak. Is that your understanding as well?

"A. Yes.

"Q. **But the soil excavation definitely was carried out is that right?**

"**A. Yes.** And there may have been one or two or several monitor wells installed at the site. There was, but I'm not sure if they were part of the work plan or they were something that was done between '83 and '89. Because there are monitor wells on the site that were put in by someone other than the State." (Appendix 58a-58b; Kettner depo, pp 19-20; emphasis added).

MDEQ's witnesses admit there was the initiation of work on the remediation and that it was undertaken in 1989. Mr. Steve Cunningham, the MDEQ Enforcement Coordinator, testified that:

Q. The plan, the work plan, or whatever you want to say, the document that is submitted under which they then go ahead and do the work, there is an initial submission to the Department that says we are going to excavate soil in 1989

and **that was approved before Gosling & Czubak did the excavation, wasn't it**?

"A. Probably. Probably. But that approval did not necessarily mean that when the work described in that plan was done that it would result in a site that was clean or the responsibilities would end there.

"Q. Oh, I don't -- I'm not contesting that Mr. Cunningham. **What I am saying is, though, that it was the initiation of work aimed at remediation that was undertaken in 1989.**

"A. **That would be a true statement**.

"Q. **I mean, they initiated the work. What you're saying is they didn't complete it, but there is no question they initiated remedial action 1989**.

"A. **That would be true**." (Appendix 10b, Cunningham depo, pp 78-79; emphasis added).

Also submitted to the trial court was the further testimony of Mr. Kettner, the MDEQ Environmental Quality Manager who approved the remedial action in 1989, who admitted the ultimate remedial action by MDEQ is soil excavation, the same mode of clean-up initiated in the 1989 work, showing that it was both approved as to appellees, and was the remedial action selected by the MDEQ:

"Q. And when he removed contaminated soil, that's part of a clean-up, isn't it?

"A. Right.

"Q. And clean-up is part of remedial action, isn't it?

"A. Yes.

"Q. **Have you changed -- within the Department changed its analysis of where it was going with the clean-up of this site?**

"A. **No.**

* * *

"Q. It's because you internally characterize the funds as interim response. **But in fact the final clean-up activity undertaken by the Department is soil excavation, which is the same method of clean-up that was undertaken in 1989; isn't that right**?

"A. I guess I understand your question correctly that **yes, we did the same thing they did; correct. They just didn't do enough**." (Appendix 134a-135a, Kettner depo, pp 95-96; emphasis added).

2. While not discussed in appellant's Brief, there was no question as to the fact that physical on-site construction activities had been initiated in 1989 after the approval by the MDEQ, submitted as a "Remedial Action Plan". (Appendix 1b-8b). A copy of the actual approval letter by the DEQ is Kettner deposition exhibit 6, which is Appendix 24a-25a.

When asked specifically, Mr. Kettner admitted that excavation is a construction activity:

"Q. You regard excavation as construction activity?

"A. Yes." (Appendix 44a-45a, Kettner depo, pp 5-6).

Other construction activities conducted in 1989 in conjunction with the excavation included the actual dismantling of the bulk plant in August, 1989. Approximately 2,500 cubic yards of fuel contaminated soil were excavated and disposed of off-site. (Appendix 60a-61a, Kettner depo, pp 21-22). Describing these construction activities, Mr. Kettner testified:

"Q. Okay. Can you tell me what was dismantled at the site?

> "A. I believe that the entire bulk plant was disconnected, tanks were emptied and the tanks removed over approximately 100 feet. And the excavation that was conducted was in the area of the -- where the bulk plant had previously sat. And then, when the excavation was terminated, then the tanks were reconditioned, painted and a new facility was built from that equipment back of the same -- approximately the same location." (Appendix 61a, Kettner depo, p 22).

Thus, the deposition testimony of Mr. Kettner and Mr. Cunningham, both MDEQ representatives, belie the suggestions in appellant's Brief that remedial action had not been approved, or selected, or initiated.

3. The suggestion in appellant's Brief that there was contamination as a result of activities of Bay Oil Co. that contaminated the new soils that were installed in 1989, certainly was a suspicion of DEQ, yet not borne out with admissible evidence from testing. To the contrary, in the deposition of Daniel Capone, the actual contractor who did the work on the site for the MDEQ, he made clear that clean soil put in in 1989 was not re-contaminated by Bay Oil.

Importantly to disproving the suggestion that Bay Oil re-contaminated the area where soil was removed and replaced in 1989, Mr. Capone's deposition ruled out Bay Oil having made a release of contaminants into the formerly excavated and replaced soil. He testified that there were "no previously excavated areas, i.e., clean back-fill, that were 're-excavated' due to additional contamination after previous excavations occurred". (Appendix 39b, Capone depo, pp 64-65).

Indeed, the soil sampling in 1992 and 1993 conducted by the State's contractor, on which the 1995 excavation was based, showed **there were no contaminated soils from the surface down to the water table, in any of the soil samples of clean fill of**

1989, even those around the pump house where allegedly spills had occurred. (Appendix 39b, Capone depo, pp 63-64). Moreover, these soils were so clean that Mr. Capone said the State's contractor stockpiled those soils for use as back fill after completing the deeper excavation in 1995. (Appendix 39b, Capone depo, p 64).[1]

The suggestion by Appellants that Bay Oil Co had, through its operations, continuously contaminated the soil, even after 1989, is refuted by Mr. Capone's testimony and the fact that the soil was clean in the zone closest to the surface. (Appendix 50b, 51b). Moreover, the DEQ's suspicion that the overflow "slop" tank had caused contamination of previously cleaned soil, as alleged in the MDEQ's First Amended Complaint (Appendix 16b, paragraph 29), based on a July 11, 1991 sample, was also disproven by the State's contractor who collected the sample. (Appendix 40b, Capone depo, pp 68-69).

The MDEQ had also made reference to a barrel found on the site at the conclusion the state's contractor's operations, but that was not from the operations of Bay Oil Company. (Appendix 63b, Swander Depo; Appendix 65b, Gassman Depo).

Thus, the MDEQ suggestion that further costs were incurred after 1989 because Bay Oil Co. re-contaminated the new soils at the site is neither accurate nor fairly presented. The Court of Appeals was generous in allowing a remand for appellants to develop proofs of post-1989 contamination, on a claim that is so weak that appellants

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[1]The 1995 soil removal was for the deepest and oldest contamination. The MDEQ settled with the operator most remote in time, before commencing this suit. (Appendix 20b, Plaintiffs' First Amended Complaint, paragraph 57). The 1995 excavation by the MDEQ was at a lower depth of soil than the 1989 excavation, and at a location consistent with a discharge by Total, the settling party. See Appendix 41b, Capone depo, pp 71-73.

hadn't even argued it orally on Appellees' motion in the trial court, nor pursued penalties for it even after prevailing on the penalties portion of the motion for summary disposition.

4. The final area highlighted in this counterstatement of facts relates to the not too subtle suggestion by Appellants that the Court must manipulate the statute of limitations so cleanup costs are not placed on the MDEQ. Not presented to the Court by Appellants is the involvement of another party, Total Petroleum, that operated the site before either Woodland Oil and Bay Oil. While lacking precision, the MDEQ's Mr. Kettner speculated Total's responsibility at 50%. (Appendix 95a, Kettner depo p 56). Total didn't participate in the cleanup in 1989 when Appellees dismantled the bulk plant and cleaned up the site with the 2,500 cubic yards of soil excavation (Appendix 48a, Kettner depo p 9), and replaced it with clean fill above the water table. The State subsequently removed approximately 2,000 tons, equated to 2,000 cubic yards of soil in 1992 (Id.), and a further unspecified amount in 1995 (Appendix 50a, Kettner depo, p 11). MDEQ settled with Total in April, 1996. (Appendix 20b, paragraph 57).

Most telling, this shows that MDEQ could and did formulate a claim within 6 years of appellees' 1989 cleanup against the party that had not participated in cleanup of its share. It was an afterthought, evidenced by waiting until the following year, that MDEQ sued the parties that had in fact participated in their share of the clean up but didn't sue the party with the oldest operations and most likely responsible for the deeper contamination cleaned up by MDEQ in 1991-1995. Notable, MDEQ could have sued all three parties in April, 1996, allowing contribution claims between the parties pursuant to MCL 324.20129(3), instead of proceeding to settle with Total. That

settlement of course bars contribution claims by the present defendants under MCL 324.20129(5). Instead of a prompt suit, in an apparent afterthought, MDEQ sued in 1997, after the statute of limitations had run as to appellees, and, after making a settlement in 1996 with the party that had not participated in any cleanup. Again, that settlement was before the statute of limitations had run. The idea suggested that this Court has to rewrite by interpretation the statute of limitations lest the MDEQ has to fund cleanups, is frivolous and inappropriate and not presented with a fair factual picture of MDEQ's actual actions particularly with regard to Total Petroleum.

LEGAL ARGUMENT

I. THE LOWER COURTS CORRECTLY APPLIED THE STATUTE OF LIMITATIONS BECAUSE THE REMEDIAL ACTION WAS APPROVED AND INITIATED MORE THAN SIX YEARS BEFORE SUIT WAS COMMENCED.

Appellants argue that the lower courts erroneously equated response activities and remedial action in applying the six year statute of limitations in MCL 324.20140(1)(a), and therefore held that all response activities constitute remedial actions under Part 201 when they should have characterized them as interim response activities. Appellants then argue that the Court should have instead looked to MCL 324.20118, as an additional requirement for a "remedial action" for the statute of limitations, even though not in the "remedial action" definition of MCL 324.20101(1)(cc), and treated interim response as mutually exclusive with remedial action and hence not governed by the statute of limitations.

The flaw in appellants' argument is that it disregards the rules of construction of statutes in general and statutes of limitations in particular, and results in appellants being able to, through their *ipse dixit*, determine whether a statute of limitations starts or never starts. The most reliable indicator of legislative intent is the words of the statute itself. *Crowe v Detroit*, 461 Mich 1, 6; 631 NW2d 693 (2001). As this Court has said, "[O]ur obligation is to examine the statute in an effort to discern and give effect to the legislative intent that may reasonably be inferred from the text of the statute itself." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 634 (2001). Moreover, a word or phrase is given meaning by its context or setting. *Crowe, supra*, 465 Mich 1, 6:

> "Contextual understanding of statutes is generally grounded in the doctrine of noscitur a sociis: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting.' *Tyler v Livonia Pub Schs*, 459 Mich 382, 390-391; 590 NW2d 560 (1999)."

Here the text that Appellant overlooks provides clear indication of intent as to "remedial action", and, the distinction from "interim response activity." Interim response is by definition "prior to implementation of remedial action"[2], so the important question is whether there is context indicating when there is such implementation of remedial action, both to distinguish interim response and apply the statute of limitations? The answer is yes, and, right in the text of the statute of limitations. Implementation of remedial action occurs when there is "physical on-site construction activities." That is the context in which the Legislature has linked remedial action and thus given the term

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[2]MCL 324.20101(1)(u): "'Interim response activity' means the cleanup or removal of a released hazardous substance or the taking of other actions, prior to implementation of a remedial action, ..."

"remedial action" a clear meaning by its association with "construction activities" that is otherwise not derived from the definition of interim response and the definition of remedial action, both of which specify "cleanup".

Thus the bright line test for remedial action meant by the term in the statute of limitations in MCL 324.20140, in light of this Court's admonition in *Crowe, supra* to apply the principle of *noscitur a sociis*, is that remedial action means onsite physical construction activities. That text based meaning squares with the "prior to implentation of remedial action" in the "interim response activity" definition since implementation implies action. Importantly, both the previous definition of "response activity" cited by the trial court, and the present definition of "remedial action" which keys the statute of limitations have as key text the common elements "clean-up" and "removal". Any doubt of meaning is eliminated by the textual meaning supplied by the associated words, "onsight physical construction activities." When parties submit a plan for cleanup and start excavating, dismantling a plant, and reconstructing it, there is the clarity prescribed by statute. The meaning of "remedial action" is thus taken out of the realm of theory and into the practical realm of a date when construction begins that allows identification of the date, and, clarifies that it is remedial action.

The approval by the MDEQ is the only other condition, but two things are noteworthy. First, "a person may undertake response activity without prior approval by the department," MCL 324.20114(2), so approval, as opposed to instructing to go forward with no assurance of approval, is significant.

Secondly, the statute of limitations is triggered by selection of remedial action, as well as approval. The suggestion by Appellants that there must be some formality to

the approval of a remedial action is not borne out by the language of either the definition of "remedial action", which is broad and inclusive[3], nor in the statute of limitations itself, MCL 324.21040(1)(a). Notably the statute of limitations has the disjunctive "selected or approved" in MCL 324.20140(1)(a). If one contemplates how the DEQ could select but not approve a remedial action, it is inescapable that the legislature, for statute of limitations purposes, did not intend to impose any formal approval of previously approved or selected remedial action plans, or it would not have specified the disjunctive "selected", which negates the meaning that remedial action would have to be formally approved to be "remedial action" under MCL 324.20140.

a. Rules for construction of statutes of limitations.

Appellants' position that there was merely a series of interim response actions and never a remedial action so that the statute of limitations started is not only contrary to the definitions of "interim response activity", which contemplates a followup remedial action, but also this position of Appellants is violative of the rule that courts should avoid "an interpretation of statutes of limitations that could prolong indefinitely the time for bringing suit." *Guastello v Citizens*, 11 Mich App 120; 160 NW2d 725, 729 n 7 (1968). The State, as a plaintiff, cannot ignore this. Both statute and case law precedent from this Court require that statutes of limitations be applied "equally" to the State as to private citizens. MCL 600.5815(3); *People v Clement*, 356 Mich 314, 316; 96 NW2d 804 (1950). Moreover, a statute of limitations defense is "'not a disfavored plea but a

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[3]MCL324.20101(1)(cc): "'Remedial action' includes but is not limited to cleanup, removal ... ." By the language of inclusion, and the focus on actions, not process of approval, the statutory definition allows both formal and informal approval.

with a cleanup initiated by private parties, it would allow the MDEQ to manipulate the statute through its form of approval of clean-up and prolong endlessly a suit. MDEQ is essentially saying that it, as a plaintiff, can decide if a statute of limitations starts.

To achieve this result, appellant MDEQ has to create a false dichotomy between remedial action and interim response, when the text of the statute of limitations is clearly keyed to only "remedial action", and the text of the "remedial action" definition is broadly inclusive of subjects that may be touched on elsewhere in the Act but are not made mutually exclusive in either the statute of limitations, MCL 324.20140(1)(a), nor in the breadth of the "remedial action definition (" remedial action includes but is not limited to clean-up..."). Then Appellants criticize the Court of Appeals for addressing the false dichotomy they proposed, attempting to lull this Court into a position of error that focuses on interim response and not the text of the statute of limitations and its key components, "remedial action selected or approved by the department", and "initiation of physical on-site construction activities" that gives a specific contextual meaning to "remedial action" for purposes of the statutes of limitations. Then, Appellants re-characterize all of the activities that have taken place between 1983 and 1995 as simply interim response activities, even their own final clean up.

While the free product removal from 1983 to 1986 fully meets the definition of "interim response activities", the plan that was submitted in 1989 for MDEQ approval, as a remedial action plan, (Appendix 1b-8b) and which was approved for the "initiation of physical on-site construction activities", and which had three phases, for "clean-up of the subject site" (MDEQ approval letter, Appendix 24a-25a), fits exactly within the definition of "remedial action" in MCL 324.20101(1)(cc):

> "'Remedial action' includes, but is not limited to, **clean-up**, **removal**, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment."

At the time the MDEQ approved the plan in 1989, the definition of "remedial action" was not a part of the Environmental Response Act, as is aptly noted by the Circuit Judge in his opinion. However, it is significant that the definition of "response activity" at that time still had "clean-up" and "removal" as components. See Public Acts 1982, No. 307, MCL 299.603(j):

> "'Response activity' means an activity necessary to protect the public health, safety, welfare, and the environment, includes but is not limited to, evaluation, **clean-up, removal**, containment, isolation, treatment, monitoring, maintenance, replacement of water supplies, and temporary relocation of people as determined to be necessary by the Governor or the Governor's designee."

In light of this, the circuit court opinion is eminently correct that there is a close analogy between the previously designated "response activity" and the presently defined "remedial action", for the purpose of the statute of limitations. Both specify clean-up and removal. The Legislature was the author of both, and had it wanted to limit the applicability of the statute of limitations where cleanups had been initiated before 1990, different text would have been written in either MCL 324.20140(1)(a) or the definition of "remedial action" in MCL 324.20101(1)(cc).

And, if one considers the alternative, it simply makes no sense. Under the MDEQ's interpretation, there would be a category of response activity costs for which the statute of limitations would never start. Worse, this result would be dependent on

the administrative agency's self-serving and after-the-fact re-characterizations of its approvals.

Nor is the fallback position of MDEQ correct on page 18, footnote 3 of Appellants' Brief, that the RJA general statute of limitations would permit the action under MCL 600.5813, if interim response is not governed by MCL 324.20140 and instead is governed by RJA. Following this line of logic from MDEQ, since interim response is thus not governed by MCL 324.20140, it is also not controlled by *Shields v Shell Oil Co*, 463 Mich 939; 621 NW2d 215 (2000). As strictly an RJA matter, MDEQ would still be incorrect. Under the RJA, "the claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damage results." MCL 600.5827. The MDEQ did have costs before 1991, they were just not being sought, as MDEQ's counsel admitted at the hearing on the motions in the circuit court. See Appendix 167a. It is the fact of identifiable loss, not finality of monetary damages that would start the general statute of limitations running. *Luick v Rademacher*, 129 Mich App 803; 342 NW2d 617 (1983). Thus the claim accrued, and, subsequent damages do not give rise to a new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred. *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 309; 399 NW2d 1 (1986) ("The general rule is that subsequent damages do not give rise to a new cause of action."); *Connelly v Paul Ruddy's Co*, 388 Mich 146, 151; 200 NW2d 70 (1972) ("Later damages may result, but they give rise to no new cause of action, nor does the statue of limitations begin to run anew as each item of damage is incurred.")

Of course it is not necessary to follow this MDEQ detour to reach the correct result, since interim response contemplates that there will be remedial action by its reference to "prior to implementation of remedial action" in MCL 324.20101(1)(u), and implementation of remedial action is given normal meaning by "initiation of physical on-site construction activities" in MCL 324.20140(1)(a), which dispels the otherwise tortured meanings ascribed by MDEQ. Nor does the Department's reference to MCL 324.20118 and MCL 324.20114 yield a different result. Different aspects of remedial action are dealt with throughout Part 201, but those are not made conditions of the definition of "remedial action" in its text, nor are they made conditions of the applicability of the statute of limitations. The statute of limitations, in using a defined term, is keyed only to the definition of "remedial action" in Section 20101(1)(cc), and the meaning of remedial action that must be ascribed by the context of the additional express condition stated in Section 20140(1)(a), that being "initiation of physical on-site construction activities." The other condition is the disjunctive "selected or approved", which points away from any formal approval under any other provision. Certainly if the legislature wants to add more conditions, it knows how to do so. Having added these two additional conditions, it is apparent that if the legislature wanted even more conditions, it could have so stated in the text of the Act.

Notably, besides Section 20118, other statutes bear on the details of remedial action. For example, the supposedly immutable conditions argued for by MDEQ under Section 20118 are actually flexible, as seen in MCL 324.20120(a)(2). This statute allows the use of site specific criteria. And, the clean-up criteria are not fixed, either. Under MCL 324.20120(a)(18), the clean-up criteria can change annually. Moreover,

appellants' position in the Court of Appeals regarding the trial court's citation to the *City of Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616; 583 NW2d 215 (1998), was patently inconsistent. There appellants argued that the trial court misplaced its reliance on this precedent which holds that rules relating to plans are permissive and not mandatory, see 229 Mich App 616, 631, on the basis that this case did not relate to a statute of limitations issue. But that is exactly the level of analysis that the MDEQ is at, suggesting that instead of just looking to the text of the statute of limitations in Section 20140(1)(a), and the definition of "remedial action" which keys the statute, Section 20101(1)(cc), that the trial court should have looked to other statutes such as on interim response activities, apart from the statute of limitations. Thus, on the one hand the MDEQ has criticized the trial court for considering other statutes and the flexibility of the rules of the MDEQ, while at the same time claiming that the "remedial action" must "in addition" to the statutory definition meet the statutory requirements of Section 20118, or be deemed mutually exclusive to interim response activities in Section 20114, despite the absence of any such conditions relating to Section 20118 or Section 20114 in the definition of "remedial action" in Section 20101(1)(cc).

Certainly appellant's position on Section 20118 and Section 20114 can be reconciled to Section 20101(1)(cc), since the definition of "remedial action" in the latter begins by saying it "includes but is not limited to" the listed criteria. It therefore is sufficient for the statute of limitations that the "remedial action" provided for clean-up and removal since those are within the "includes but not limited to" terms. The fact that the MDEQ may or may not impose other requirements certainly does not negate the fact that remedial action as textually defined statutorily includes “clean-up” and

"removal", and in fact the plan for this was submitted, was approved and was initiated with physical on-site construction activities. If the MDEQ wanted more conditions of approval of the remedial action in 1989, it could have so stated. As recognized in *City of Port Huron, supra*, there is flexibility in MDEQ approvals:

> "Because the MDNR rules are permissive, not mandatory, the private party in a cost recovery action under Section 12(2)(b) did not have to establish that it performed a remedial investigation, or remedial action plan, or a feasibility study if the MDNR does not require them. Because the MDNR determined that plaintiff was not required to complete a remedial investigation, remedial action plan or feasibility study in this case, the trial court did not err in ruling the plaintiff was entitled to recover its clean-up costs under the MERA."

The flexibility retained by the MDEQ to not even apply Section 20118 to itself cuts against its position. It claims even the MDEQ itself never performed a remedial action, a position that is patently inconsistent with its position that the Act must be read as a whole to treat interim response as mutually exclusive with remedial action. This is inconsistent since "interim response activity" expressly contemplates that it is interim, not final, to be followed by remedial action, in MCL 324.20101(1)(u). On the other hand, if the interim response activity is actually the final cleanup modality, then the MDEQ articulates no good reason why, for statute of limitations purposes, the text of MCL 324.20140(1)(a) and 324.20101(1)(cc) shouldn't be applied as written.

II. MDEQ'S RATIONALE IS REJECTED UNDER CERCLA.

The MDEQ refers to CERCLA cases construing that, but ignores two things. One is that Michigan's Act does not have the "record of decision" requirement of CERCLA, which would provide a definitive bright line test for approval or a lack of

approval of a clean-up plan. In *City of Port Huron*, the Court of Appeals noted there was a distinction between CERCLA and the Michigan Act, saying, "federal case law construing the CERCLA and the NCP is inapposite to this case".

Secondly, even if one were to consider CERCLA, the leading case on statute of limitations under CERCLA, totally rejects the MDEQ's rationale. See *California v Hyampom Lumber Co*, 903 F Supp 1389; 142 ALR Fed 705 (ED Cal, 1995).

As in the instant case, *Hyampom Lumber* involved an industrial site. In *Hyampom*, contamination resulted from treating lumber with a chemical that dripped on the ground over a long period of time. The commonality to the instant case is that the Court there construed the statutory language under CERCLA ,"initiation of physical on-site construction of the remedial action", which is similar to if not narrower than the language of the Michigan statute, specifying additional "activities":

> "Initiation of physical on-site construction **activities** for the remedial action." MCL 324.20140(1)(a); MSA 13A.20140(1)(a). (Emphasis added).

In *Hyampom Lumber*, the governmental entity there had started the remedial action by way of construction of a fence and installation of utility lines prior to final approval of a permanent plan. Noteworthy, the governmental entity there argued that the initiation of remedial action should be considered to be the soil excavation. 903 F Supp 1389, 1391:

> "The State argues that the limitations period began to run on October 28, 1988, when the excavation began at the site."

The actual holding and rationale in *Hyampom Lumber* is thus highly persuasive and defeats the MDEQ's position. The Court addressed the type of argument the

MDEQ makes in this case, that being, that there would have to be final approval of a permanent plan, in addition to the statutory definition, for there to be remedial action starting the statute of limitations. Rejecting this because it would judicially change the legislative definition of "remedial action", the Court said:

> "Plaintiff nevertheless contends that this action is timely because these activities are 'removal' actions and therefore cannot be fairly classified as 'remedial'. In support of its position, plaintiff cites a number of district court decisions for the proposition that a 'removal' action is not complete until a document has been issued which contains the final remedies selected for the site. (Citations omitted). In plaintiff's view, these cases stand for the idea that every response action that occurs prior to final approval of the permanent remedy must be characterized as a 'removal' action. Thus, plaintiff argues, any response activity that occurred at the Jenson site prior to October 19, 1988 is a 'removal' action as a matter of law, and therefore cannot trigger the accrual of the limitations period of Section 9613(g)(2)(B).
>
> "**These cases do not, and in fact could not, consistent with CERCLA, stand for the proposition that remedial activity could not begin prior to the final approval of the permanent remedy. This would make the lengthy definition of 'remedy' and 'remedial action' appearing in Section 9601(24) meaningless -- the terms would simply be defined as all response activities which occur after the final approval of the permanent plan.**" 903 F Supp 1389, 1392-1393. (Emphasis added).

The MDEQ makes the same erroneous argument rejected in *Hyampom Lumber*, and attempts to lull the Court into ignoring the statutory definition of "remedial action" that does exist in Section 20101(1)(cc). It, like the CERCLA definition, simply does not have 'final approval of the permanent plan' in the definition, nor 'response activities which occur after final approval of a permanent plan'. Rather, cleanup and removal

with physical on-site construction activities suffice, particularly since selected or approved by MDEQ, and the statute of limitations starts with initiation not completion. *Accord, Union Carbide Corp v Thiokol Corp*, 890 F Supp 1035, 1042 (SD Ga 1994) (building a fence falls within the ordinary meaning of physical on-site construction, commencing the CERCLA statute of limitations).

Here there is no question of fact that there was a submission of a work plan to the MDEQ on April 18, 1989, labeled as a "remedial action plan." There is no question the plan was approved for initiation of clean up work by way of physical on-site construction activities that were extensive, to the point of dismantling and then reconstructing the plant. There is no question that it was for "clean-up" of the subject site. There is no question that clean-up is within the "remedial action" definition of Section 20101(1)(cc). There is no question that the MDEQ regards excavation as construction activity as well as the dismantling of the bulk plant and reconstruction of it. There is no question that this was initiated in 1989, with 2,500 cubic yards of contaminated soil removed in August, 1989. (Appendix 60a-61a, Kettner depo, pp 21-22). And, soil excavation was the selected remedial action, since it is the same modality of cleanup ultimately utilized by the MDEQ. So it is the remedial action "selected" by MDEQ as well as being "approved". There is no question this suit was filed more than six years after physical on site construction activity was initiated, and is barred by the text of the statute of limitations.

III. THE MDEQ'S INTERPRETATION YIELDS THE ABSURD RESULT THAT THE LEGISLATURE IN ENACTING A STATUTE OF LIMITATIONS, ACTUALLY ENACTED A STATUTE OF NO LIMITATIONS.

Amazingly, appellants argued in the Court below and tacitly proceed here on the basis that the statute of limitations has not even yet started, even though the MDEQ is suing for substantial costs that it says it incurred to clean-up the site to the extent it was deemed necessary (and didn't recover from Total Petroleum, the party that didn't participate at all in cleanup). MDEQ does this by ignoring the fact that the statute of limitations refers to the "initiation" of work, and, argues in a circular fashion that under Section 20118, there must be complete clean-up attained for there to be remedial action. Thus, because the State waives any requirements of compliance with Section 20118 as to itself, MDEQ says it can complete the clean-up with the exact same modality of clean-up that was initiated in 1989, that being soil removal, yet have all of the activities initiated since 1983 be characterized as a series of interim response activities, and therefore let the State totally avoid the statute of limitations by its self-serving assertion.

But, the legislature clearly contemplated something in adopting Section 20140(1)(a). Under the MDEQ's interpretation, it is a statute of no limitations for itself as to its response activity costs because it can call its final clean-up "interim" response, depriving the term "interim" sensible meaning and substituting a meaning of "interim or permanent" as MDEQ deems fit. This flexibility of meaning is befitting of Alice in Wonderland, but not the text of the statute.

Respectfully, the idea that the legislature in adopting a statute of limitations was in fact adopting a statute of no limitations as to the MDEQ, is absurd. While MDEQ cites to rules for statutory construction, it ignores two that are most pertinent. One is to avoid a manifest contradiction of the apparent purpose of enactment, with resulting absurdity. See *People v Burton*, 87 Mich App 598, 602; 274 NW2d 849 (1978); *Williams v Cleary*, 338 Mich 202, 206, 208; 60 NW2d 910 (1953). The second and most compelling rule of construction is that Courts should avoid "an interpretation of statute of limitations that could prolong indefinitely the time for bringing suit". *Guastello v Citizens*, *supra*, 11 Mich App 120; 160 NW2d 725, 729 n 7.

The reason MDEQ is violating these principles is revealed in the inconsistency of the MDEQ. On the one hand it says that a plan under Section 20118 is mandatory to remedial action, but on the other hand, it never needed such a plan for itself. *Ergo* the statute of limitations never started. Indeed, under the MDEQ's interpretation, its present suit is not even ripe for adjudication since its cause of action has not fully accrued, according to its strained logic. Its position cannot be squared with the settled rules of construction recognized and applied in *Guastello, Williams, People v Burton*, and *Frankenmuth v Marlette, supra*.

CONCLUSION AND RELIEF REQUESTED

The lower courts are correct that Plaintiffs' claims are barred. Defendant-Appellee Bay Oil Co requests that the decision of the Ingham County Circuit Court on the applicability of the 6 year statute of limitations in MCL 324.20140(1)(a) be reinstated and the Plaintiffs' claims be dismissed.

Respectfully submitted,

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